Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

Janet Pippins,

Petitioner

v.

Tangipahoa Parish Council and Gordon Burgess,

Respondent

On Petition of Writ of Certiorari
To the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What is the proper analysis for purposes of determining summary judgment?

2. Did the district court and the Fifth Circuit improperly apply the summary judgment standard for employment discrimination cases?

PARTIES TO THE PROCEEDINGS

1. Janet Pippins, petitioner
2. Tangipahoa Parish Council, respondent
3. Gordon Burgess, respondent

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DISTRICT COURT
United States District Court
for the Eastern District of Louisiana
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Janet Pippins v. Tangipahoa Parish Council and Gordon Burgess
No. 04-30817
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STATEMENT OF JURISDICTION

The decision and opinion of the United States Court of Appeals for the Fifth Circuit was issued and filed on **January 26, 2005**. This Petition for Writ of Certiorari is filed within 90 days after the filing of that opinion and decision. The jurisdiction of the United States Supreme Court is invoked pursuant to 28 United States Code § 1254(1) providing in pertinent part:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

STATUTES INVOLVED

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STATEMENT OF THE CASE

Janet Pippins was wrongfully terminated from her position as the director of the Tangipahoa Parish's Animal Control Department based on her gender on March 19, 2002. Gordon Burgess, Tangipahoa's Parish President, made the decision to terminate Ms. Pippins. In making such a decision, Mr. Burgess proffered four reasons. Through this litigation Ms. Pippins has proven that none of the proffered reasons are credible and the true motivation for her termination was unlawful gender discrimination. In particular, Mr. Burgess claimed that Ms. Pippins: 1) failed to keep department spending within budgetary restrictions; 2) had poor public relations; 3) had poor moral within her department; and 4) resisted a directive by Mr. Burgess to not intervene in animal abuse cases involving livestock. Ms. Pippins presented a substantial amount of evidence to dispute all four reasons, including, but not limited to the testimony of Mr. Burgess himself, yet the district court dismissed the case on summary judgment and the 5th Circuit upheld the district courts decision.

The explanations given by Mr. Burgess are pretexts, and for that reason his motives for terminating Ms. Pippins must have involved gender discrimination. It was established in the discovery phase of this litigation that Ms. Pippins had no control over the actual spending of her department. Thus, Mr. Burgess' first proffered reason was proven to be a pretext as he conceded to this fact in his deposition. Next, in regards to Mr. Burgess' claim of poor public relations, it was established that Ms. Pippins dealt with the local press upon the order of Mr. Burgess. In fact, it was Mr. Burgess who ordered her to continue speaking with a local reporter despite the fact that the reporter refused to report any complimentary stories regarding the department and focused only on stories that were less than flattering. Mr. Burgess also makes the

claim that Ms. Pippins' office had a moral problem. However, there was absolutely no evidence presented to substantiate this claim. Finally, Mr. Burgess claimed that Ms. Pippins resisted his directive regarding the handling of livestock cases. However, the evidence clearly indicated that this allegation was false as Mr. Burgess was unable to cite one incident in which Ms. Pippins had violated his directive. In fact, as the evidence established, on January 29, 2002, Tangipahoa Animal Control responded to a request from the Sheriff's Department to handle an issue on Galafora Road regarding starved horses. Prior to responding to the request Janet Pippins obtained permission from Preston K. "Buddy" Weir, Parish Finance Administrator. The procedure stipulated at the time was that Animal Control officers could investigate livestock cases accompanied by a Tangipahoa Parish Sheriff's deputy, but could not seize or impound animals without the approval of Mr. Burgess or Mr. Weir. Ms. Pippins followed this directive even though she had not yet been issued the directive. In a separate incident on March 12, 2002, Ms. Pippins rode with an Animal Control Officer to follow up on a complaint regarding mistreated and possibly dying horses. Upon arriving at the location she observed several horses in a very poor condition. Ms. Pippins followed Mr. Burgess' directive as she contacted the sheriff's office to send a deputy so that she could speak with the owners of the horses. Soon after, Ms. Pippins was contacted by Donna Damiano, Mr. Burgess' secretary, and told to immediately contact Mr. Burgess because he was very upset. Even though Ms. Pippins followed the directive given to her, Mr. Burgess screamed at her and ordered her back to the animal shelter. Ms. Pippins followed his directive and returned to the shelter, where she contacted the Brand Commission so that the horses would be cared for. Neither Ms. Pippins, nor the Tangipahoa Animal Shelter seized any horses involved in this incident. In fact, when Ms. Pippins was asked by the Brand Commission to shelter

the seized horses, she refused in light of Mr. Burgess' directive. As these were the only two incidents involving livestock within the preceeding months of Ms. Pippins' termination, Mr. Burgess was unable to articulate in any way how Ms. Pippins' actions in either case was a violation of his directive.

On January 19, 2003, Janet Pippins filed suit. Despite the fact that the record is absent of any evidence that substantiates that Janet Pippins violated any order, the district court granted summary judgment to the defendants on June 8, 2004. On January 26, 2005, the Court of Appeals for the Fifth Circuit incorrectly upheld that improper decision.

ARGUMENT

Summary judgment applies where there is "no genuine issue as to any material fact." *Machinchick v. PB Power*, 2005 U.S. App. LEXIS 1165, 4 (5TH Cir., 2005). When analyzing a case for summary judgment the facts should be considered in a light most favorable for the non-moving party. *Reeves v. Sanderson Plumbing Prods.*, Inc., 530 U.S. 133, 152 (2000). The Civil Rights Act of 1991 section 107(m) designated a "motivating factor" as the standard of review in employment discrimination cases. Historically, the Supreme Court has designed two frameworks for employment discrimination cases: *McDonald Douglas* and *Price Waterhouse*.

McDonald Douglas Corp. v. Green, 411 U.S. 792, 801, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), establishes three steps to prove that discrimination took place. The first step is to determine if the plaintiff can establish a *prima facie* case. If the plaintiff is capable of meeting this burden, it is then the

burden of the defendant to proffer a non-discriminatory reasons for the adverse action. If the defendant is capable of doing so, then the plaintiff must dispute the non-discriminatory reasons by questioning its validity and proving that the proffered explanation is a mere pretext to disguise unlawful discrimination.

The second discrimination analysis, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 238, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), left confusion over whether the standard should be "substantial" or "motivating" factor. However, the Civil Rights Act of 1991 requires proof that discrimination was a "motivating factor" in the employer's choice to make an adverse employment decision. Discrimination does not have to be **the** reason for the adverse action, but rather **a** reason. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99-102,123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003) (emphasis added).

The problem with these two analyses, since the *Desert Palace* decision, is that the circuits are divided on how to analyze cases on summary judgment. Because circumstantial evidence can be useed in a *Price Waterhouse* mixed motive case, there are conflicting views on whether the *McDonald Douglas* analysis should still be utilized. Some circuits have not dealt with the issue, while others have created a clear plan.

I. How to Analyze Summary Judgment in Employment Discrimination Cases

The circuits that have dealt with the issue of how to analyses summary judgment cases in light of *Desert Palace* have created four different ways to view evidence. Each of these methods gives evidence a different weight, which

could be a determinative factor in whether a case survives summary judgment.

The first method was created by the Fourth Circuit, which utilizes the *McDonald Douglas* framework and the mixed motive, *Price Waterhouse*, framework as two separate ways to look at the facts. *Mereish v. Walker*, 359 F. 3d 330, 334 (4th Cir., 2004). *EEOC v. Warfield-Rohr Casket Company, Inc.*, 364 F.3d 160, 163 (4th Cir., 2004). Under this theory, a plaintiff can claim either framework at the summary judgment phase.

The Third, and Fifth Circuits follow the *McDonald Douglas* framework and give two options at the pretext stage. The plaintiff can: 1) prove pretext; or 2) that the case is a mixed motive case where discrimination was a motivating factor. *Parks v. Rumsfeld*, 2005 U.S. App. Lexis 150, 4-5 (3rd Cir., 2005). *Rachid v. Jack in the Box*, 375 F. 3d 305, 312 (5th Cir., 2004). This framing of the issues is similar to that of the Fourth Circuit, except a plaintiff has to establish a *prima facie* case. Even if the plaintiff has strong circumstantial evidence that would prove discrimination was a motivating factor, the case will end on summary judgment if the plaintiff cannot prove a prima facie case.

Next, the Seventh Circuit questions whether there is a motivating factor as part of the *McDonald Douglas prima facie* case, but the Seventh Circuit has not answered the question of what happens after a plaintiff establishes a prima facie case. *Hall v. Babb*, 389 F.3d 758, 762 (7th Cir., 2004).

Finally, the Eleventh Circuit uses the *McDonald Douglas* framework, but at the third stage instead of asking if there is pretext, the court asks if discrimination was a motivating factor. Proof of pretext can be used in making the determination if discrimination was a motivating factor for

the adverse action. *Hall v. Alabama Association of School Boards*, 326 F.3d 1157, 1167 (11th Cir., 2003).

The various circuits use different criteria in deciding if summary judgment is appropriate in employment discrimination cases. The different means of evaluating summary judgment create a question of whether reasons given by an employer that are proven to be pretext can be used in deciding motivating factor. The Eleventh Circuit is the only circuit that clearly states that proof of pretext helps substantiate that discrimination was a motivating factor. This Honorable Court should settle the matter concerning how to determine summary judgment and how evidence of pretext should be incorporated.

II. Whether the fifth circuit and the district court improperly applied the standard for summary judgment

Following *Desert Palace*, the Fifth Circuit created a new form for summary judgment in employment discrimination cases. In *Rachid v. Jack in the Box*, 375 F. 3d 305, 312 (5th Cir., 2004), the court combined the *McDonald Douglas* analysis and the mixed motive *Price Waterhouse* analysis. *Rachid* follows the *McDonald Douglas* framework by requiring that the plaintiff first prove a prima facie case. Then *Rachid* compels the defendant to provide non-discriminatory reasons for its action. However, at the third stage, *Rachid* gives the plaintiff a choice to analyze the case under pretext or to prove discrimination was a motivating factor. Both the district court and the Fifth Circuit analyzed Ms. Pippins case only from a pretext standpoint. They neglected to consider a mixed motive analysis. They also misconstrued key facts given in depositions as the overwhelming evidence which established pretext was not

viewed in a light most favorable to the non-moving party in a summary judgment stage.

Pretext:

It was without question that Ms. Pippins established a prima facie case as such was conceded by defendant at the summary judgment stage. The only issue before the court at that point was whether or not defendants' proffered explanation was a mere pretext for unlawful discrimination. The record evidence more than substantially carried that burden as each of Mr. Burgess' proffered explanations was proven to be pretextual by his own testimony. As such, this matter was improperly disposed of at the summary judgment stage as credibility determinations should have been left to a jury.

First, the district court and the appellate court could not have viewed all the circumstantial evidence in a light most favorable to Ms. Pippins and still neglect to find pretext. Thus, either the courts failed to consider the circumstantial evidence or they did not view the case in a light most favorable to Janet Pippins. The appellate court stated that the employer's reasons were "relatively so substantial that a reasonable jury" could not find for the plaintiff. Judgment of the Fifth Circuit court of Appeal, p. 3. Mr. Burgess gave four reasons that he claimed to rely on in his decision to terminate Ms. Pippins: 1) failed to keep department spending within budgetary restrictions; 2) resisted a directive by Mr. Burgess to not intervene in animal abuse cases involving livestock; 3) had poor moral within her department; and 4) had poor public relations. Ms. Pippins provided very influential information discrediting all of these reasons and yet the district court still improperly determined that she had not proven pretext. This determination was made even in

light of the testimony from the decision maker that established that his proffered explanation was false.

Mr. Burgess claimed that Ms. Pippins failed to keep to the budget. However in its decision the district court stated that the, "record reveals some inconsistencies in Burgess' explanation regarding the complaint regarding the budget." District Court's Order and Reasons p. 18. The district court considered that this rational could be a pretext, and therefore this provided reason would not be sufficient to grant summary judgment. It is the jury's job to weigh the facts. Yet, the Fifth Circuit did not take into account the district courts finding that there was enough evidence to question whether the overdrawing on the budget was a pretext. In making this decision the Fifth Circuit went against the district courts findings without explaining why it overturned the fact-finding by the district court.

The district court also considers Mr. Burgess' explanation that he terminated Ms. Pippins because she failed to follow his directive regarding livestock. In this matter the district court misconstrued the plaintiff's statement regarding the policy on livestock. Ms. Pippins was only involved in two significant incidents involving livestock. The first was not an issue, because she followed a procedure created by Mr. Burgess, even though she had not yet received her directive regarding the procedure. The incident at issue is March 12, 2002. The district court states that it was the policy at that time to leave intervention in livestock cases to the Parish Sheriff and the Brand Commission. This was not the case. PEx #3, p. 21 In her deposition Ms. Pippins stated that Mr. Burgess' plan was for Ms. Pippins to contact a Tangipahoa Sheriff's deputy to observe the animal with her and then to get permission from Mr. Wier or Mr. Burgess before seizing the animal. R. 357-358, 403. Ms. Pippins followed this procedure and this was

the only procedure she knew of at the time. It was only after this incident that Ms. Pippins was informed that she should contact the Brand Commission so that they could care for livestock instead of the Animal Control Department. It is because the district court misconstrued the timeline of events that it mistakenly did not find pretext.

This evidence is only reinforced by the fact that Mr. Burgess could not think of any instance where Ms. Pippins failed to follow his directive. The appellee's brief states that Ms. Pippins "resisted the implementation of this policy," but it does not explain how she "resisted the implementation." Brief for Appellee, p. 6. Ms. Pippins has clearly stated that while she did not like the policy, she was willing and did follow the directive given to her by Mr. Burgess. R. 301. In his deposition, Mr. Burgess was unable to provide any instance where Ms. Pippins refused to follow his directives. R. 359. How can there not be "sufficient evidence" if the person who made the decision admits in his deposition that his reasoning is a pretext? The truth is that Ms. Pippins did follow the orders given to her and complied by turned away an abused horse when she was asked to care for it. R. 301. Ms. Pippins at no time disregarded Mr. Burgess' order. Thus, his non-discriminatory reason is not only weak, but there is sufficient circumstantial evidence to prove Mr. Burgess' reason is a pretext.

Mr. Burgess also gave additional reasons for his termination of Ms. Pippins. However, neither the district court, nor the Fifth Circuit considered by name the other non-discriminatory reasons in their final explanation of their decision. Thus, it can be assumed that the other reasons given were not strong enough to justify the termination or there was not sufficient proof to justify summary judgment. The defense did not prove that the media problem or the poor office morale were actually caused by Ms. Pippins. If Mr.

Burgess fired Ms. Pippins based on these reasons, he should provide evidence that led him to believe that Ms. Pippins caused these problems. Yet, the defendant has not provided evidence that these two issues were caused by Ms. Pippins, which is part of its burden of production under *Reeves*. Therefore, the only reasons given by Mr. Burgess that are under consideration are his complaints concerning the budget and livestock. Ms. Pippins has proven through circumstantial and direct evidence that both of these reasons are pretexts.

However, even if it is found that the appellate court did consider circumstantial evidence in its determination on summary judgment, then it is apparent that the Fifth Circuit did not view the evidence in a light most favorable to Janet Pippins. If the court had viewed the evidence in a light most favorable to Ms. Pippin's then it would have found sufficient disputed evidence for a trial. Because of the dispute over the evidence and the convincing proof of pretext, this case should be decided by a jury. Thus, summary judgment was not appropriate.

Motivating Factor:

Rachid also addressed the change in proof needed to overcome summary judgment. The Civil Rights Act of 1991 only requires the plaintiff to prove that gender discrimination was a motivating factor. Neither the district court, nor the Fifth Circuit addressed whether gender discrimination was a motivating factor in this case. In addressing this question it is clear that plaintiff's *prima facie* case should be considered. However, the Fifth Circuit is unclear on whether proof of pretext can be applied when determining if discrimination was a motivating factor. The Eleventh Circuit clearly espouses the idea that it should be contemplated and is an

important element. Because there is not uniform understanding, the issue of pretext should be considered.

Ms. Pippins proved a *prima facie* case by presenting evidence that her position was filled by a man, who was in her opinion less qualified. But, she also presented evidence proving pretext. Ms. Pippins clearly caused the district court to question three of Mr. Burgess non-discriminatory reasons and these reasons should be considered in deciding if gender discrimination was a motivating factor. The fact that Mr. Burgess gave four reasons for firing Ms. Pippins and three of the reasons were not only very questionable, but to some extent ridiculous should be a factor that the court considers. Thus, the manner of Ms. Pippins' termination mixed with the pretextual reasons given by Mr. Burgess create a question as to Mr. Burgess' motives. Because Mr. Burgess' motives can be questioned, Ms. Pippins proved that gender discrimination was a motivating factor and this case should be decided by a jury.

CONCLUSION

It is clear that the Fifth Circuit not only declined to follow case law when making its pretext determination, but also mistakenly forgot to analysis whether gender discrimination was a "motivating factor". The Fifth Circuit either did not consider the circumstantial evidence of pretext given by Ms. Pippins or it did not view the evidence in a light most favorable to Ms. Pippins. Ms. Pippin proved that Mr. Burgess' reasons for terminating her were pretexts. The Fifth Circuit also neglected to determine if discrimination was a "motivating factor." In failing to make this determination, the Fifth Circuit granted summary judgment to the defendant in a case that should have gone to the jury.

It is also apparent that conflicting law between the jurisdictions could change the effect of the evidence provided on this case. The way the case is analyzed could have an effect on the outcome. Therefore, the United States Supreme Court should grant this writ to clarify the law and give Ms. Pippins her day in court.

Respectfully Submitted by:

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APPENDIX

IN THE UNTED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-30817
Summary Calendar

JANET PIPPINS;

Plaintiff-Appellant,

Versus

TANGIPAHOA PARISH COUNCIL; GORDON BURGESS,
Individually and in His Official Capacity as Duly Elected Tangipahoa Parish President,

Defendants-Appellees.

Appeal from the United States District Court for
The Eastern District of Louisiana
(USDC No. 2:03-CV-1334)

Before REAVLEY, JOLLY and HIGGINBOTHAM, Circuit Judges.

PER CURIAM[1]

The judgment is affirmed for the following reasons:

1. We essentially agree with the analysis of the district court as set forth in the magistrate judge's Order and Reasons.

2. For the Louisiana whistleblower statute, La. Rev. Stat. Ann. §23:967 (West 1998), to apply, the employer must have committed a violation of state law. Puig v. Greater New Orleans Express Comm'n, 722 So.2d 842, 845 (La. Ct. App. 2000). The policy decision of the parish to limit animal cruelty investigations by the animal control department to pets, and to leave livestock cruelty investigations to other law enforcement officials with concurrent jurisdiction over such investigations, was not illegal or a violation of state law.

3. Summary Judgment was also warranted on the Title VII sex discrimination claim. Assuming that appellant Pippins established a *prima facie* case, the defendants offered legitimate nondiscriminatory reasons for her termination. Summary judgment was therefore appropriate if the plaintiff failed to present sufficient evidence of pretext under the summary judgment standard. See Price v. Federal Express Corp., 283 F.3d 715, 720 (5th Cir. 2002). Furthermore, a showing that the defendant's proffered justifications for the employment decision were rejected in part does not necessarily preclude summary judgment. Id. "Once a Title VII claim reaches the pretext stage, the only question on summary judgment is whether there is a conflict in substantial evidence to create a jury question regarding discrimination." Haynes v. Pennzoil Co., 207 F.3d 296, 300

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[1] Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

(5th Cir. 2000). We agree with the district court that Pippins did not present sufficient evidence of pretext for a rational jury to decide this case in her favor by finding that her termination was due to her gender. The evidence of sexual discriminations was limited to the *prima facie* proof that a man replaced her, while the evidence that she was fired for other reasons, including her failure to keep the department within its budget and the failure to follow the parish policy regarding livestock, was relatively so substantial that a rational jury could not find on this record that Pippins was terminated for discriminatory reasons.

AFFIRMED

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

JANET PIPPINS	**CIVIL ACTION**
VERSUS	**NO: 03-1334**
TANGIPAHOA PARISH COUNCIL AND GORDON BUGESS	**SECTION "N" (3)**

ORDER AND REASONS

Before the Court is a Motion for Summary Judgment filed on behalf of the defendants, Tangipahoa Parish Council and Gordon Burgess. Plaintiff, Janet Pippins ("Pippins"), filed a formal opposition memorandum and thereafter the matter was deemed submitted for determination. This matter is before the Court pursuant to the Court pursuant to the parties' consent to proceed pursuant to 28 U.S.C. 636(c). Having considered the record and the written submissions of the parties specifically addressing the defendant's Motion for Summary Judgment, the defendants' motion for summary judgment is GRANTED for the reasons set forth below.

I. CONTENTIONS OF THE PARTIES

The defendants note the plaintiff's complaint alleges three separate claims, to wit: (1) that she was fired in violation of Louisiana's "Whistleblower" statute, La. R.S. 23:967; (2) that the defendants discriminated against her on the basis of her sex in violation of state and federal law; and (3) retaliation based upon the plaintiff's alleged

confrontation was a white male subordinate regarding his inappropriate interaction with a black female employee.

First addressing the plaintiff's claim pursuant to Louisiana's Whistleblower Statute, defendants highlight that the plaintiff bears the burden of proving that reprisal against an employee, who discloses or threatens to disclose a work place act or practice, *constitutes a violation of state law*. The Parish contends that there is nothing "illegal" about its policy decision to focus the efforts of its Animal Control Department on the Parish's stray cat and dog problems and to leave the investigation of the intervention into livestock cruelty cases to the Sheriff's Department and the State's Livestock Brand Commission, which has personnel throughout the state of Louisiana and, together with the Parish Sheriff, are empowered and certified to perform the investigation of all crimes related to livestock, including animal health issues and cruelty. Inasmuch as there is no requirement that Parish governments have an Animal Control Department, defendants contend that it cannot be seriously questioned that the Parish may lawfully limit department duties to running the "dog pound," leaving the investigation of equine cruelty/mistreatment cases to specialists employed and trained by the State Department of Agriculture to handle all matters concerning livestock. Essentially, defendants submit that the plaintiff cannot prove that official policies regarding the coordination of two such agencies with overlapping jurisdiction for purposes of administrative efficiency and cost control is "illegal" within the meaning of Louisiana law or any other statute or regulation.

Plaintiff counters that the illegal action in this matter was the order restricting animal control officers sworn to uphold the laws of the State of Louisiana from doing so. Plaintiff contends that the Parish's administrative decisions predicated on budgetary concerns are of no moment. The thrust of Pippins argument is that (1) as a commissioned

animal control officer she was sworn to uphold the law; (2) Tangipahoa Parish Animal Control was equipped to handle livestock issues; and (3) she and her staff were ordered to neglect their duties with respect to livestock issues by Gordon Burgess.

Turning to the plaintiff's gender discrimination claim, the defendant contends that, applying the burden shifting framework established by *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), plaintiff's sex discrimination claim is similarly without merit. Defendants argue that the entirety of the aforesaid claim is premised on the single fact that she was replaced by a male and that, beyond pleading a *prime facie* case, there is a complete failure of proof. More particularly, the defendants note that they have amply demonstrated one or more legitimate, non-discriminatory reasons for the plaintiff's termination, to wit: (1) the plaintiff's admitted perennial failure to maintain department spending within budget; (2) admitted poor public relations with the press; (3) admitted failure to abide by Parish policy to focus the effects of Animal Control Department on stray cats and dogs, leaving intervention into livestock cases to the Parish Sheriff and the State's Livestock Brand Commission, which Commission is charged investigating such cases by Louisiana's Department of Agriculture; and (4) poor morale within Animal Control Department during the plaintiff's tenure.

Defendants point to the failure on the part of Ms. Pippins to identify any evidence of "pretext," an essential element of the plaintiff's claim upon which she bears the burden of proof. The thrust of the defendants' motion is that it is undisputed that the defendants have articulated one or more legitimate, non-discriminatory reasons for the employment decision to terminate the plaintiff and no reasonable fact finder could hold that gender discrimination motivated the defendant's decision to fire the plaintiff. Because evidence of discriminatory motive is absent, an

essential element of the plaintiff's gender discrimination claim, defendants contend that summary judgment is warranted dismissing plaintiff's gender discrimination claim with prejudice.

For her part, plaintiff maintains that she has established a *prima facie* case of gender discrimination and that summary judgment is appropriate because she has proffered substantial evidence indicating that her employer's motives are false. Essentially, it is the plaintiff's position that a jury should be allowed to make the reasonable inference that sex was a determinative reason for the decision to terminate her employment. As to her control over the budget, Pippins notes that it is undisputed that she exercised no control over the acceptance or denial of purchase orders submitted by her agency and that the assignment of the blame for her department exceeding its budget is untenable, because she had absolutely no control over approval of expenditures. As to poor public relations, Pippins argues that, despite the alleged severity of the problem, there is no reference to this shortcoming in her personal file. Plaintiff submits that Tangipahoa Parrish Council Policy requires that disciplinary actions be placed in an employee's personal file. Pippins contends that, because there is no mention of the issue in her personal file, there is no evidence regarding her poor performance in this regard. Plaintiff highlights Burgess's October 17, 2001 correspondence indicating that Pippins should be proud of her work. As to her alleged problem adhering to the Parish's directives concerning livestock issues, Plaintiff contends that Burgess was unable to cite one incident in which she violated the directive. Pippins further contends that there is absolutely no evidence of a morale problem in the Animal Control Department stemming from anything other than the fact that her department was overworked and understaffed. Plaintiff's position is that the proffered reasons have no legitimacy whatsoever and, from that alone, a reasonable

trier of fact could divine that the real motive for her termination was unlawful gender discrimination.

As to the retaliation claim, defendants argue that it falls short due to both the absence of proof a "protected activity" and a complete failure of proof of "causation." Defendants contend that it is undisputed that Burgess, who alone made the decision to terminate the plaintiff, was never made aware of the incidents upon which the plaintiff predicates her retaliation claim. Defendants highlight that, even the plaintiff, who was the supervisor in charge of the Animal Control Department and the employees in question, did not consider the "horseplay" between employees of her department either serious enough to thoroughly investigated it or to report it to her supervisor. Plaintiff does not counter the defendants' argument that they are entitled to summary judgment on her retaliation claim.

II. BACKGROUND

Plaintiff, Janet Pippins, negotiated and was given three-year contract of employment as Director of Tangipahoa Parish's Animal Control Department, commencing in February, 1997. Plaintiff was qualified for the position, holding two masters degrees, and having had twenty years experience with animals, as well as membership in local and state associations dealing with the treatment and care of animals. Her contract with the Parish was structured such that in February, 2000, *i.e.*, the end of the three-year term, the contract would automatically renew for an additional one-year unless notice was given by either party 90 days before each one-year renewal date. Ms. Pippins served her initial three-year term and it was automatically renewed for a fourth year. Prior to the end of the fourth year, the Parish timely notified her that the employment agreement would not be renewed for the following year. Instead, Pippins was notified that she would be permitted to continue in her

position as Director, but as an "at-will" employee. After a month as an "at-will" employee, Tangipahoa Parish President, Gordon Burgess, terminated Pippins for the following reasons, to wit: (1) the failure to keep department spending within the planned budget; (2) poor public relations; (3) her resistance to the policy decision to allow livestock cases to be handled by other agencies; and (4) poor work supervision and employee morale.

As to the first, plaintiff admitted that every year that she served as Director of Animal Control, her department exceeded the planned budget. *See* Pippins Deposition at p. 103. Pippins further conceded that she had poor public relations with the *Daily Star*, was "fried by the press" and refused to speak with Star reporter Ms. Schon for a period of time until relations with the press improved. *See* Pippins Deposition at pp. 182-183, 185. There was no notation of the unfavorable publicity in the plaintiff's personal file.

It is undisputed that the State Livestock Brand Commission operates in Tangipahoa Parish and has jurisdiction over health issues and infractions involving cruelty to livestock. The Commission has personnel throughout of the State of Louisiana, all of whom are P.O.S.T certified, commissioned by the State Police and empowered to investigate all crimes related to livestock, including animal cruelty claims. *See* Averitte Deposition at pp. 7-9. All complaints involving livestock, including horses, should be handled by first reporting same to the Sheriff's Office, which can, in turn, notify the Livestock Brand Commission and request assistance. *Id* at p. 10. It is further undisputed that Avertitte, an Enforcement Manger with the State's Livestock Brand Commission met with Parish President Burgess regarding coordination of their efforts. The upshot of this meeting was the understanding that the State Brand Commission would remain responsible for the investigation of livestock, insofar as health conditions and cruelty cases involving livestock, with the Parish Sheriff

being notified first. Commission Enforcement Manager Robbie Diane Averitte testified that, while she had worked together with the Tangipahoa Parish Animal Control Department in the past in some equine cruelty cases, the State Commission can handle all such matters regarding livestock on its own. *Id* at pp. 7, 14. It is further undisputed that Gordon Burgess refused to allow the Animal Control Department to intervene in cases involving equine cruelty, leaving cases involving livestock to the State and the Parish Sheriff and that this is the sole basis of the plaintiff's claim under Louisiana's "Whistleblower" Statute. *See* Pippins Deposition at p. 176. In accordance with the wishes of the Parish Council and particularly in light of the limited resources of the Animal Control Department, Burgess adopted the policy of focusing the efforts of the Parish's Animal Control Department on domestic pets (such as cats and dogs), leaving cases involving the investigation of livestock to the State Department of Agriculture's Livestock Brand Commission and the Sheriff of Tangipahoa Parish. *See* Burgess Affidavit at ¶5. It is uncontroverted that there is no requirement that any parish institute and operate an agency with the particularized purpose of animal control or law requiring any parish to employ animal control officers.

On January 29, 2002, Tangipahoa Animal Control responded to a request from the Sheriff's Department to handle a complaint on Galafora Road involving starved horses. Prior to responding, plaintiff requested permission from Buddy Weir, Parish Finance Administrator, and was instructed not to intervene. The public outcry was intense and, thereafter Burgess stipulated to the procedure of a drive-by assessment to investigate a complaint about livestock. However, if there appeared to be an infraction, Animal Control Officers were instructed to contract the Parish Sheriff to provide the necessary intervention.

On March 12, 2002, Pippins accomplished Animal Control Officer Millard E. "Billy" Gottschalck to follow-up

on a complaint of mistreated horses at a location west of Amite, Louisiana. Upon arrival, they observed several of the horses in poor condition. Pippins then notified the Sheriff's Department and requested an escort to accompany her onto the premises so that she could further investigate the owner and the livestock. During the course of this second intervention involving equine mistreatment, Pippins was contacted by Donna Domiano, Burgess's secretary, and instructed to contact him immediately. Burgess and Pippins disagreed as to the procedures applicable to the livestock issues; Pippins felt that she was in compliance and Burgess was not persuaded. Burgess ordered her to return to the Shelter and Pippins returned and contacted Robbie Averitte of the Livestock Brand Commission to report the incident. Averitte did request Pippins' assistance in sheltering the animals and Pippins refused in light of Burgess's order. The Brand Commission handled the incident in its entirety.

On March 19, 2002, on the heels of this last incident Pippins' intervention into an equine mistreatment case, Burgess fired Pippins noting that there were "a lot of complaints" and "budgetary restrictions." At the time Pippins was terminated, Burgess was not aware that Mike Harris had engaged in any inappropriate behavior (*i.e.*, "horseplay") in the workplace or that he had been corrected and counseled by his supervisor, the plaintiff. Burgess's first notice of the incidents which form the basis of the plaintiff's retaliation claim was long after Pippins filed the captioned matter, when defense counsel informed him of the basis of the plaintiff's retaliation claim. *See* Burgess Affidavit at ¶13. Pippins did not report the incident to Burgess, who alone made the decision to fire her.

III. SUMMARY JUDGMENT STANDARD

The principle purpose of Fed. R. Civ. P. 56 is to "isolate and dispose" of factually unsupported claims.[1] Summary judgment is proper where "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact . . ."[2] There is no "genuine issue" when the record taken as a whole could not lead a rational trier of fact to find for the nonmovant.[3]

Summary Judgment will be granted against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."[4] A complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.[5] "In such a situation, there can be 'no genuine issue of material fact' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."[6] The Court has no duty to search the record for triable issues.[7] Mere assertions of a factual dispute unsupported by probative evidence will not prevent summary judgment.[8]

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[1] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).
[2] Fed. R. Civ. P. 56(c)
[3] *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).
[4] *Celotex*, 477 U.S. at 323.
[5] *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993); *Celotex*, 477 U.S. at 323; *Wenner v. Texas Lottery Commission*, 123 F.3d 321, 324 (5th Cir.), *cert. denied*, 523 U.S. 1073 (1998).
[6] *Celotex*, 477 U.S. at 322-23.
[7] *Ragas v. Tennessee Gas Pipeline Co.*, 136 F. 3d 455, 458 (5th Cir. 1998).
[8] *Celotex*, 477 U.S. at 248-50; Abbot v. Equity Group, Inc., 2 F.3d 613, 619 (5th Cir. 1993).

"The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which the evidence supports his and her claim."[9] Conclusory statements, speculation and unsubstantiated assertions are not competent summary judgment evidence and will not suffice to defeat a properly supported motion for summary judgment.[10] "Summary judgment is appropriate in any case 'where critical evidence is so weak or tenuous on an essential act that it could not support a judgment in favor of the nonmovant.'"[11]

IV. ANALYSIS

A. Louisiana's Whistleblower Protection Act

Louisiana's Whistleblower Protection Act, La. R.S. 23:967, provides, in pertinent part:

> A. An employer shall not take reprisal against an employee who in good faith, and after advising the employer of the violation of law:
>
> (1) Discloses or threatens to disclose a workplace act or practice that is in violation of state law.
>
> (2) Provides information or testifies before any public body conducting an investigation, hearing or inquiry into any violation of law.

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[9] *Ragas*, 136 F.3d at 458 (emphasis added).

[10] *Id.*; *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996).

[11] *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075-76 (5th Cir. 1994) (*citing Armstrong v. City of Dallas*, 997 F.2d 62 (5th Cir. 1993)); *see also Read v. BT Alex Brown*, 2003 WL 21754966*2(5th Cir.), *cert. denied*, 2004 WL 323271 (U.S. February 23, 2004).

> (3) Objects or refuses to participate in an employment act or practice that is in violation of the law.

La. R.S. 23:967. It is clear from Pippins' deposition testimony that the sole basis of "whistleblower" liability is the policy decision by the Parish President and directive that she focus her department's efforts on stray cats and dogs and leave the investigation into livestock infractions to Louisiana's Livestock Brand Commission and the Sheriff of Tangipahoa Parish.

Pippins has identified no employment act or practice which constitutes a "violation of law," whether state or federal, and thus her claim pursuant to La. R.S. 23:967 must fail as a matter of law. It is not disputed that the Parish Government is not even required to operate an Animal Control Department and any Parish policy that would defer intervention/enforcement of laws with respect to livestock issues to the Parish Sheriff and the State's Livestock Brand Commission is simply not a violation of any law identified by Pippins.

In *Puig v. Greater New Orleans Expressway Commission*, 772 So.2d 842, 845 (La. App. 5th Cir. 2000), the court held that Louisiana's whistleblower statute does require an actual violation of law. *See also Ware v. Cleco Power LLC*, 2004 WL 1333869 (5th Cir., January 21, 2004); *Wells v. Alexandria*, 2004 WL 909735 (5th Cir., April 29, 2004).

B. Gender Discrimination under Title VII and Louisiana

Title VII makes it unlawful for an employer to discharge or otherwise discriminate against an individual with respect to that person's compensation, terms, conditions, or privileges of employment, or to otherwise adversely affect the person's status as an employee, because

of that person's sex.[12] The summary judgment test for discrimination claims under § 1983 is the same as the test for discrimination under Title VII.[13] Here, there is no evidence[14] that the defendants discriminated against plaintiff because of her sex; therefore, the familiar McDonnell Douglas burden-shifting framework applies.[15]

"Under the McDonnell Douglas framework, the parties dance an adversarial three-step, in which: (1) plaintiff proves her *prima facie* case by a preponderance of the evidence; (2) the defendant rebuts the presumption of intentional discrimination ... by articulating legitimate, non-discriminatory reasons for the challenged action; and (3) the plaintiff counters by offering evidence that the legitimate, non-discriminatory reasons are really a pretext for discrimination."[16] In a case involving direct evidence of discrimination, the aforesaid framework does not apply; rather, the burden shifts directly to the defendant to show that the same action would have been taken regardless of the impermissible criterion.[17]

To establish a *prima facie* case of unlawful termination on account of gender, the plaintiff must prove that: (1) she was qualified for the position at issue; (2) she was within a protected class; (3) she was fired; and (4) her

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[12] *See* 42 U.S.C. § 2000e-2(a).

[13] *See Patel v. Midland Memorial Hospital and Medical Center*, 298 F.3d 333, 342 (5th Cir. 2002), *cert denied*, 537 U.S. 1108 (2003); *Pratt v. City of Huston*, 247 F.3d 601, 605 n.1 (5th Cir. 2001).

[14] In the Title Vii context, direct evidence of discrimination is evidence that proves that the defendant acted with discriminatory intent without the need for inference or presumption, including any statement or document which shows on its face that an impermissible criterion served as a basis for the adverse employment action. *See Fabela v. Socorro Indep. School Dist.*, 329 F.3d 409, 415 (5th Cir. 2003).

[15] *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 222 (5th Cir. 2000).

[16] *Rutherford v. Harris County Texas*, 197 F.3d 173, 180 (5th Cir. 1999)(*quoting Casarez v. Burlington Northern/Santa Fe*, 193 F.3d 334, 337 (5th Cir. 1999)).

[17] *See Fierros v. Tex. Dept. of Health*, 274 F.3d 187, 192 (5th Cir. 2001).

position was filed by someone outside of the protected class.[18]

If the plaintiff establishes a *prima facie* case, an inference of discrimination arises and the defendant must articulate some legitimate, non-discriminatory reason that, if believed, would support a finding that the employment decision was legitimate and non-discriminatory.[19] Defendant need not persuade the court that it was actually motivated by this reason.[20] The aforesaid burden on the employer is one of production only, not persuasion, involving no credibility assessments.[21] In *Sandstad v. CB Richards Ellis, Inc.* 309 F.3d 893 (5th Cir. 2002), the Firth Circuit disagreed with the plaintiff's argument that *Reeves* required the court to disregard the testimony of managers participating in the employment decision, "which would in effect eliminate his burden to show that the [defendant's] explanation is pretextual."[22]

If the employer carries its burden of production, the mandatory inference of discrimination established by the *prima facie* case fades from the picture[23] and the plaintiff must come forward with evidence to show that the defendant's proffered reasons are false and that unlawful discrimination was a determinative factor.[24] The burden of

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[18] *Rutherford v. Harris County, Texas*, 197 F.3d 173, 179 (5th Cir. 1999).
[19] *See Sandstad v. CB Richards Ellis, Inc.*, 309 F. 3d 893, 898 (5th Cir.), *cert. denied*, 123 S. Ct. 2572 (2003), *reh'g denied*, 124 S. Ct. 36 (2003).
[20] *Williams v. Time Warner Operation, Inc.*, 98 F.3d 179 (5th Cir. 1996).
[21] *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000) (*citing St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509 (1993)); *see also Sandstad*, 309 F.3d at 898.
[22] *Id.* at 898.
[23] *Reeves*, 530 U.S. at 142-43.
[24] *See Read v. BT Alex Brown, Inc.*, 2003 WL 21754966* 2 (5th Cir.), *cert. denied*, 2004 WL 323271 (U.S. February 23, 2004); *Wallace v. Methodist Hospital System*, 271 F.3d 212, 224 (5th Cir. 2001) (rejecting the plaintiff's argument that her *prima facie* case considered in tandem with the *allegedly* substantial evidence of pretext rendered the district

persuasion that the defendants intentionally discriminated remains at all times with the plaintiff.[25] Ultimately, "liability depends on whether the protected trait actually motivated the employer's decision."[26] Specifically, the plaintiff must demonstrate that her gender actually played a role in the employer's decision-making process and had a determinative influence on the outcome.[27]

The Supreme Court in *Reeves* neatly summarized what the plaintiff's evidence must show to avoid summary judgment as a matter of law, to wit: (1) that the stated reasons were not the real reason for the adverse employment decision; and (2) that prohibited discrimination was the real reason for the adverse employment decision.[28] The Supreme Court clarified that, to meet this burden, "a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's justification is false, *may* permit the trier of fact to conclude that the employer unlawfully discriminated."[29] Factors relevant to aforesaid inquiry include "the strength of the plaintiff's *prima facie* case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered."[30] The *Reeves* Court observed: "Certainly there will be instances where, although the plaintiff has established a *prima facie* case and set forth

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court's grant of JMOL inappropriate under *Reeves*), *cert. denied*, 535 U.S. 1078 (2002).

[25] *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993); *Meinecke v. H & R Block of Houston*, 66 F.3d 77, 83 (5th Cir. 1995).

[26] *Reeves*, 530 U.S. at 141 (*citing Hazon Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)).

[27] *See Travis v. Board of Regents of Univ. of Texas System*, 122 F.3d 259, 263 (5th Cir. 1997) ("A Title VII plaintiff bears the burden of proving not only that the employer's purported reasons for taking adverse employment action are pretextual, but also that the employer engaged in illegal discrimination.")

[28] *See Reves*, 530 U.S. at 153.

[29] *Id.* at 148 (emphasis added).

[30] *Price v. Fed. Express Corp.*, 283 F.3d 715, 720 (5th Cir. 2002).

sufficient evidence to reject a defendant's explanation, no rational factfinder could conclude that the action was discriminatory."[31]

Because the plaintiff bears the ultimate burden of proving that intentional discrimination was a motivating factor by a preponderance of the evidence, she "must produce substantial *evidence* that the defendant's nondiscriminatory reason is merely a pretext for impermissible discrimination."[32] "Where the plaintiff fails to produce substantial evidence of pretext, or produces evidence permitting only an indisputably tenuous inference of pretext, summary judgment in favor of the defendant is appropriate."[33] "Nothing in Reeves ... abrogates Bauer's requirement of substantial evidence to support a claim of pretext."[34]

The Court need not decide whether Pippins has established a *prima facie* case, since for the purposes of the instant motion for summary judgment, the defendant concedes that the plaintiff has in fact done so. Turning to the issue of whether the defendant has proffered a legitimate non-discriminatory reason for the employment decision at issue, clearly it has proffered at least one or more legitimate non-discriminatory reasons. As discussed above, the defendant Burgess has submitted an affidavit, replete with specific details, regarding the creation of the Animal Control Department and the Director's position, as well as Pippins contract, which was automatically renewed for a term of one year in accordance with its terms. Thereafter, plaintiff was

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[31] *Reeves*, 530 U.S. at 148.

[32] *Read v. BT Alex Brown, Inc.* 2003 WL 21754966* 2 (5th Cir. 2003) (italicized emphasis added); *Auguster v. Vermilion Parish School Board*, 249 F. 3d 400, 403 n. 3 (5th Cir. 2001); *Bauer v. Albermarle Corp.*, 169 F.3d 962, 967 (5th Cir. 1999).

[33] *Read, supra (citing Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 897 (5th Cir. 2002) and *Brown v. CSC Logic, Inc.*, 82 F.3d 651 (5th Cir. 2002)).

[34] *Auguster*, 249 F.3d at 403 n. 3.

timely notified that the contract would not be renewed after the fourth year. After one month as an "at-will" employee, plaintiff was notified that she was terminated for reasons previously enumerated above. Thus, in order to survive summary judgment, Pippins must offer sufficient competent summary judgment evidence of pretext to create a question of fact for the jury that gender was the real reason the Burgess "fired" her.

Other than this solo instance, there is no evidence that Burgess ever discriminated against her or any other employee on the basis of her sex. Plaintiff does not allege a pattern of discrimination against her by the Parish. Plaintiff's evidence falls far short of the mark required to prove intentional discrimination on account of her sex. Burgess alone made the decision to fire the plaintiff on the heels of two incidents involving her active intervention into livestock cases. The evidence admits only that Burgess and Pippins had a major disagreement regarding who would intervene in matters involving livestock and that, in this regard, the working relationship was frayed. The second incident, on March 2, 2002 in which Pippins intervened in a livestock/equine mistreatment incident, occurred only after Burgess stated that Parish policy was to leave the intervention into such cases to the Parish Sheriff and Brand Commission. There is simply no evidence from which a rational factfinder could divine intentional discrimination on the basis of *sex*.

Pippins must establish some nexus between that adverse employment action and the plaintiff's gender. A bald assertion that one exists simply will not suffice.[35] Merely disputing an employer's assertion of an employee's work performance will not necessarily support an inference of pretext. Burgess has articulated at least one legitimate and nondiscriminatory reason for his actions. Therefore, "the

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[35] *See id.*

question is not whether an employer made an erroneous decision; it is whether the decision was made with discriminatory motive."[36] For a factfinder to infer pretext, the plaintiff must show that she was "clearly better qualified," as opposed to merely better qualified than her successor.[37] In order to defeat summary judgment, the difference in qualifications must be "so apparent as virtually to jump off the page and slap us in the face."[38] Moreover, evidence of superior qualifications must be more than merely subjective and speculative;[39] evidence of comparative work performance is needed.[40]

Plaintiff's opinion of herself and her work experience or classification of herself as better qualified than the person who succeeded her as the Director are insufficient to provide an inference of discriminatory intent by the defendant.[41] "As the Fifth Circuit has noted, the issue at stake in an employment discrimination case is not whether the employer's decision was the correct decision or a fair decision or the best decision; rather, the issue is whether the employer had a discriminatory motive."[42] The summary judgment record is bereft of any proof that the illegitimate criterion (sex) actually motivated Burgess' decision to fire her.

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[36] *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1091 (5th Cir. 1995).

[37] *See Price v. Federal Express Corp.*, 283 F.3d 715, 723 (5th Cir. 2002); *EEOC v. La Office of Community Services*, 47 F.3d 1438, 1444 (5th Cir. 1995); *Nichols v. Loral Vought Systems Corp.*, 81 F.3d 38, 41 (5th Cir. 1996).

[38] *Louisiana Office of Community Services*, 47 F.3d 1445.

[39] *See Nichols*, 81 F.3d at 41.

[40] *See id.*

[41] *See Lawrence v. University of Texas Medical Branch at Galveston*, 163 F.3d 309, 312-13 (5th Cir. 1999).

[42] *Weathersby v. Saks*, 1999 WL 148441 *2 (E.D. La.) (McNamara, J.) (citing *Deines v. Tex. Dept. of Protection and Regulatory Services*, 164 F.3d 279, 282-82 (5th Cir. 1999).

Moreover, it defies logic that Burgess and/or the Parish of Tangipahoa, which initially negotiated a three-year contract with the plaintiff (a female) for the position of Director of the Animal Control Department and allowed the plaintiff's contract to be automatically extended for one year, would later intentionally discriminate against her *on the basis of sex*. In the case of discriminatory firing, where the individual plaintiff's hiring and firing supervisor are one and the same, the Fifth Circuit has held that such a situation gives rise to an inference of non-discrimination. The *Brown* court explained that it is unlikely that a decision maker "would hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job."[43]

In the final analysis, Pippin's subjective perception of discriminatory motive is all that remains. It has long been the law of the Fifth Circuit that an employee's own subjective belief of discrimination, no matter how genuine, cannot serve as the basis for judicial relief.[44] Moreover, the subjective belief of a fellow employee, whether coworker or supervisor, suffers from the same defects as the plaintiff's subjective belief.[45] Where, as here, the employee fails to adduce evidence refuting a rational, non-discriminatory reason articulated by the employer, pretext cannot be established by the subjective belief that the illegitimate criterion gender motivated the employer's decision.[46] The summary judgment record reveals some inconstancies in Burgess' explanation regarding the complaint regarding the budgetary constraints and the plaintiff's failure to reign in

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[43] *See Neito v. L & H Packing Co.*, 108 F.3d 621, 624 (5th Cir. 1997) (*citing Brown v. CSC Logic*, 82 F.3d at 658) (internal quotation marks omitted).

[44] *See, e.g., Price v. Marathon Cheese Corp.*, 119 F. 3d 330, 337 (5th Cir. 1997); *Armendariz v. Pickerton Tobacco Co.*, 58 F.3d 144, 153 (5th Cir. 1995), *cert. denied*, 516 U.S. 1047 (1996).

[45] *See Little v. Republic Refining Co.*, 924 F.2d at 93, 96 (5th Cir. 1991).

[46] *See Armendariz*, 58 F.3d at 153.

spending; however, other considerations including her failure to abide by his directives were most apparently the driving force behind the decision to fire her. The record evidence does not admit a finding of either falsity of the explanation given for the plaintiff's termination or pretext.[47] Burgess' affidavit detailing the specifics leading up to his decision to fire Pippins suffers from no lack of detail and is corroborated in pertinent part by the plaintiff's own deposition testimony.

Suffice it to say, "discrimination suits still require evidence of discrimination."[48] Looking at the summary judgment record as a whole, the Court concludes that the plaintiff has failed to advance *substantial* evidence to support an inference of intentional *gender* discrimination.

C. Retaliation

In order to establish a *prima facie* case of retaliation under either Louisiana law or Title VII, the plaintiff must show that: (1) she engaged in activity protected by Title VII; (2) there was an adverse employment action; and (3) a causal nexus between the protected activity and the adverse employment action.[49] Louisiana courts look to Title VII standards to apply La. Rev. Stat. 51:2256 and thus the aforesaid standards are the only ones that need be examined.[50] To show a causal nexis, a plaintiff must show (1) a protected activity that (2) was among the factors motivating the adverse employment action.[51] Temporal proximity between the protected activity and the adverse

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[47] *See Read*, 2003 WL 21754966 ** 6-7 (5th Cir. 2003).

[48] *Rubinstein v. Administrators of Tulane Educational Fund*, 218 F. 3d 392, 400 (5th Cir. 2000).

[49] *See Casarez v. Burlington Northern/Santa Fe Co.*, 193 F.3d 334, 339 (5th Cir. 1999).

[50] *See Devillier v. Fidelity & Deposit Co. of Md.*, 709 So. 2d 277, 280 (La. App. 3rd Cir. 1998); *McMillan v. Corridan*, 1999 WL 729250, at *2 (E.D. La. Sept. 15, 1999).

[51] *See Long v. Eastfield College*, 88 F.3d 300, 305 n. 4 (5th Cir. 1996)).

employment action may be a significant factor in showing this causal nexus.[52]

The incidents allegedly giving rise to Pippins' retaliation claim involve her alleged confrontation with a subordinate white male, Michael Harris, regarding his alleged inappropriate behavior, i.e., "horseplay," with a black employee, Ms. Mobley. Details set forth by the plaintiff describing the incidents do not describe any type of "protected activity." *See* Pippins Deposition at pp. 162-163. Additionally, Pippins conceded that she did not bring the incident to the attention of Burgess and she could not remember whether it was reported to her superior, the finance director, Mr. Weir. *Id* at 163-164.

Under Title VII, an employee has engaged in protected activity if he or she has (1) "made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this subchapter."[53] Here, the participation clause is not implicated at all. More particularly, it is undisputed that, with respect to the incidents in question, there was no charge, investigation, proceeding or hearing instituted and Ms. Mobley never complained about "the horseplay" in question. To satisfy the "opposition clause," Pippins need not prove that the Parish's practices were actually unlawful; however, plaintiff must show that she had "a reasonable belief that the employer was engaged in unlawful employment practices."[54] Simply stated, a showing of a subjective good faith is insufficient.[55] Pippins engaged in no investigation of the incidents and does not even remember

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[52] *See Evans v. City of Huston*, 246 F. 3d 344, 356 (5th Cir. 2001); *Swanson v. Gen. Servs. Admin.*, 110 F.3d 1180, 1188 (5th Cir. 1997).

[53] 42 U.S.C. § 2000e-3(a)(emphasis added). *See also Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 427-428 (5th Cir. 2000).

[54] *Byers*, 209 F.3d at 428 (*citing Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. 1981).

[55] *Id.*

reporting that fact that she reprimanded Harris to her superiors. Under the circumstances, even a showing of subjective good faith belief regarding an unlawful employment practice cannot be made in this case. In summary, plaintiff cannot show protected activity at all, much less "protected activity" that was at least part of Burgess's motivation for firing her.

Accordingly,
IT IS ORDERED that the defendants' Motion for Summary Judgment is hereby GRANTED. New Orleans, Louisiana, this 12 day of July, 2004.

/s/
DANIEL E. KNOWLES, III
UNITED STATES MAGISTRATE JUDGE

STATUTE

Civil Rights Act of 1991 Sec. 107
Added into Civil Rights Act of 1964 Section 703(m)

Sec. 107 Clarifying Prohibition Against Impermissible Consideration of Race, Color, Religion, Sex, or National Origin in Employment Practices

(a) In General. – Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by sections 105 and 106) is further amended by adding at the end the following new subsection:

> (m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(b) Enforcement Provisions. – Section 706(g) of such Act (42 U.S.C. 2000e-5(g)) is amended –

> (1) by designing the first through third sentences as paragraph (1);
>
> (2) by designating the fourth sentence as paragraph (2)(A) and indenting accordingly; and
>
> (3) by adding at the end the following new subparagraph:
> (B) On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court-

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m); and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

No. 04-1442

Supreme Court, U.S.
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In The

Supreme Court of the United States

JANET PIPPINS,

Petitioner,

v.

TANGIPAHOA PARISH COUNCIL
and GORDON BURGESS,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION

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ARGUMENT

Petitioner's argument concerning the summary judgment standards used by the circuit courts of appeal in "mixed motive" cases is a red herring. This is not a "mixed motive" case, and thus does not even present the issue of the proper summary judgment standard in such cases.

Furthermore, there is no split among the circuits regarding the evaluation of employment discrimination claims at the summary judgment stage. The central focus of the inquiry made by all circuits is whether the plaintiff received less favorable treatment because of a protected characteristic. The *McDonnell Douglas* approach is merely a tool provided to the lower courts to aid in their inquiry. Although all circuits may not use precisely the same terminology in framing their analysis, they all remain focused on whether the plaintiff has produced evidence to support a genuine issue of fact as to whether or not he or she was the victim of an employment decision motivated by a protected characteristic.

I. This Is Not a "Mixed Motive" Case.

As the trial court made plain in its opinion, plaintiff produced no evidence, direct or circumstantial, that her employer considered her sex in deciding to terminate her. That court opined: "The summary judgment record is bereft of any proof that the illegitimate criterion (sex) actually motivated Burgess' decision to fire her." (Opinion of the trial court, reproduced at p. 20 of petitioner's appendix.) It is this complete and total lack of evidence – either direct or circumstantial – that caused the trial court to dismiss petitioner's suit. In light of this lack of evidence of discriminatory motive, the Fifth Circuit affirmed the

trial court's decision in an unpublished opinion (which has no precedential value). *See* footnote 1 of the Fifth Circuit's opinion, reproduced in petitioner's appendix at p. 2. It stands to reason that the Fifth Circuit's opinion does not contain an extensive discussion of the proper summary judgment standard in "mixed motive" cases, for the simple reason that petitioner produced no evidence that a discriminatory motive played any part in her termination.

II. The Central Focus of the Inquiry Made by All Circuit Courts at the Summary Judgment Stage of Employment Discrimination Cases Is Whether the Plaintiff was Treated Less Favorably because of Protected Characteristics.

This Court has created an evidentiary burden-shifting framework to aid courts in their evaluation of employment discrimination claims at the summary judgment stage. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). This approach is not intended to be a rigid framework applicable to all cases. *Id.* at 802. Under the *McDonnell Douglas* approach the plaintiff must (1) establish a *prima facie* case, (2) the defendant is then called upon to articulate a legitimate reason for its action, and (3) the plaintiff can then succeed in his claim only if he proves that the defendant's proffered reason is merely a pretext. The central focus is "always whether the employer is treating some people less favorably than others because of their race, color, religion, sex, or national origin." *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978), citations and internal quotations omitted.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) the issue before the

Court was whether the plaintiff could be successful following a trial on the merits if she had proved a "mixed motive" – *i.e.*, that although the employer had a legitimate reason for its actions, a protected characteristic was also an additional motivating factor in the employer's decision. Thereafter, some circuit courts required direct evidence for a plaintiff to succeed under the *Price Waterhouse* "mixed motive" analysis. However, in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003), the Court held that the plaintiff in a "mixed motive" case was not required to produce direct evidence of a discriminatory motive in order to have the jury receive a "mixed motive" instruction. Thus, under *Desert Palace,* the plaintiff is not limited to direct evidence when trying to succeed in a "mixed motive" case. Nevertheless, *Desert Palace* did not change the requirement that the plaintiff must provide *some* evidence of discrimination, even if it is indirect or circumstantial evidence.

Even had this case presented a "mixed motive" analysis, there is no true split in the circuits in how such cases are analyzed by the courts. The opinion of the Fifth Circuit in the case *sub judice* does not articulate any "mixed motive" analysis and is furthermore unpublished, and therefore of no precedential value. The published opinions of the Fifth Circuit concerning summary judgment in "mixed motive" cases are not inconsistent with the opinions of the other circuits.

In *Mereish v. Walker*, 359 F.3d 330, 334-39 (4th Cir. 2004) the court framed its analysis in terms of the *McDonnell Douglas* approach. The court held the plaintiff's evidence that the defendant's proffered legitimate basis for its actions was merely a pretext was wholly insufficient to raise a genuine issue of material fact.

Mereish, 359 F.3d at 399. Furthermore, the court held that the record demonstrated that the defendant's decision was solely motivated by its proffered legitimate reason. *Id.* at 340. The court stated, "There is simply no evidence – direct or circumstantial – upon which a jury could reasonably conclude that age was a motivating factor in [the defendant's] decision to terminate [the plaintiff]." *Id.* Therefore, the central focus in *Mereish* was whether the employer was treating some people less favorably than others because of a protected characteristic.

In *EEOC v. Warfield-Rohr Casket Comp., Inc.*, 364 F.3d 160 (4th Cir. 2004) the court reviewed a lower court's decision to grant summary judgment to the defendant of an employment discrimination claim. Although, the court describes pretext and mixed motive cases as alternative methods of proof, the court held the evidence did not conclusively show that the defendant would have terminated the plaintiff if his age had not been considered. *Id.* at 163, 165. The court's central focus was whether the plaintiff was treated less favorably than others because of his age. *Id.* 163-65. The court reversed summary judgment in favor of the defendant because evidence existed such that a reasonable jury could find a protected characteristic was a motivating factor in the defendant's actions. *Id.* at 165.

Parks v. Rumsfeld, 119 Fed.Appx. 382, 2005 WL 19465 (3rd Cir. 2005), cited by the petitioner, is an unpublished opinion, not considered precedential by the Third Circuit.[1]

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[1] Internal Operating Procedure Rules of the Third Circuit provides there are two forms of opinions: precedential and not precedential. I.O.P. Rule 5.1 (3rd Cir.). The face of the opinion states whether it is

(Continued on following page)

However, the precedential effect of *Parks* is not relevant because it does not support the petitioner's argument that a circuit split exists. In *Parks*, the Third Circuit frames its analysis in terms of the *McDonnell Douglas* approach. The court assumes *arguendo* that the plaintiff can establish a *prima facie* case and that the defendant can proffer a legitimate basis for its action. *Id.* at 4. The court held that there was simply not enough evidence provided by the plaintiff to provide a basis for an inference of discrimination. *Id.* at 8. Thus, there can be no basis to support a finding that the defendant's proffered reason is a pretext or that a protected characteristic was a motivating factor in the defendant's decision.

The Fifth Circuit's analysis in *Rachid v. Jack in the Box*, 376 F.3d 305 (5th Cir. 2004) is also framed in terms of the *McDonnell Douglas*, however the existence of a *prima facie* case was at issue. The petitioner in the case at bar now argues that *Rachid* means, "Even if the plaintiff has strong circumstantial evidence that would prove discrimination was a motivating factor, the case will end on summary judgment if the plaintiff cannot prove a *prima facie* case." (Petition for Writ of Certiorari, p. 8) Although not clearly articulated, it seems the petitioner intends to argue that rigid requirements exist to establishing a *prima facie* case in an employment discrimination case under the *McDonnell Douglas* approach. It is true that in *Rachid* the court outlined four elements a plaintiff must show in order to establish a *prima facie* case, and the plaintiff had not definitively established those elements. *Id.* at 309, 313. However, the plaintiff's case did ***not*** end

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precedential or not precedential. *Id. Parks v. Rumsfeld*, 119 Fed.Appx. 382, 2005 WL 19465 (3rd 2005) states that it is "Not Precedential."

because these four elements were not established. *Id.* To the contrary, the court expressly held that a *prima facie* case can be established with other evidence. *Id.* at 313. The court's holding that the plaintiff established a *prima facie* case was in fact based circumstantial evidence, namely comments the defendant made about the plaintiff's age in the past. *Id.* Therefore, there is no merit in petitioner's argument that the *McDonnell Douglas* approach could prematurely end a plaintiff's case if it is based only on circumstantial evidence. Thus, the court's central focus remained whether the plaintiff received less favorable treatment because he was a member of a protected class.

In *Hall v. Babb*, 389 F.3d 758 (7th Cir. 2004) the issue before the court was whether the evidence existed to support the plaintiff's claim that a protected characteristic was a motivating factor in its selections for promotions. *Id.* at 765. The court held that no evidence existed to create a material dispute as to whether a protected characteristic was a motivating factor and therefore affirmed summary judgment in favor of the defendant. *Id.*

In *Hall v. Alabama Association of School Boards*, 326 F.3d 1157 (11th Cir. 2003) the court framed its analysis of the lower court's post-trial decision in favor of the defendant in terms of the *McDonnell Douglas* approach. The court noted the determination that a proffered legitimate basis for the defendant's action is a pretext aids in making the determination of what were the motivating factors. *Hall*, 326 F.3d at 1167. The court held that the *McDonnell Douglas* approach is not a "substitute for reaching the ultimate issue of whether the employee has, in fact, been a victim of discrimination." *Hall*, 326 F.3d 1167 (internal

quotations and citations omitted). Furthermore, the court reached the ultimate question and concluded that it could not find that race had been a motivating factor in the defendant's decision. *Id.* at 1169.

In addition to the cases cited by the petitioner the Eighth Circuit has also dealt with the effect of *Desert Palace* on the *McDonnell Douglas* approach. *Strate v. Midwest Bankcentre, Inc.*, 398 F.3d 1011 (8th Cir. 2005). The court defined the term "pretext" within the third step of the *McDonnell Douglas* approach to mean the defendant's proffered reason is a "pretext *for unlawful discrimination*, not merely false in some way." *Strate*, 398 F.3d at 1017 (emphasis contained in original text). The court held that at the summary judgment stage the controlling issue ordinarily is "whether or not there exist a genuine issue of fact regarding *any* discriminatory motive." *Id.* (emphasis contained in original text). Furthermore, the focus of its inquiry at summary judgment stage "always remains on the ultimate question of law: whether the evidence is sufficient to create a genuine issue of fact as to whether the employer intentionally discriminated against the plaintiff because of [the protected characteristic]." *Id.* at 1018 *quoting*, *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1336-37 (8th Cir. 1996). The court held that *Desert Palace* affirmed its application of the *McDonnell Douglas* approach allowing a plaintiff to survive summary judgment where the evidence, direct or circumstantial, establishes a genuine issue of fact regarding an unlawful motivation for an employment action based on a protected characteristic, even though the plaintiff may not be able to create genuine doubt as to the truthfulness of a different, yet lawful, motivation. *Strate*, 398 F.3d at 1018.

The common thread in all of these cases is that an employee cannot succeed in a discrimination case if he has no evidence – either direct or circumstantial – that the employer's decision was based in part on a discriminatory motive. The circuit courts are all consistent in applying this core principle and, thus, there is no split in the circuits.

CONCLUSION

Petitioner's case is not a "mixed motive" case because she produced no evidence, direct or circumstantial, that would tend to show that her sex motivated her employer's decision in any way.

Furthermore, there is no split among the circuits regarding the evaluation of "mixed motive" employment discrimination claims at the summary judgment stage. The *McDonnell Douglas* approach is merely a tool provided to the lower courts to aid in their inquiry. The central focus of the inquiry made by all the circuits is whether the plaintiff received less favorable treatment because of a protected characteristic. The petitioner cites *Mereish*, *Warfield-Rohr*, *Parks*, *Rachid*, *Babb*, and *Alabama Association of School Boards* as evidence of a split among the circuits. However, after careful review of these cases it is clear that, although all the circuits may not use precisely the same terminology in framing their analysis, they all focus on the core issue of whether the plaintiff has produced evidence to support a genuine issue of fact as to whether or not he or she was the victim of an employment

decision motivated by a protected characteristic. Therefore, no need exists for the Court to grant *certiorari* in this case.

Respectfully submitted,

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